

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 714 of 1989****For Approval and Signature:****HONOURABLE MR.JUSTICE DN PATEL**

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1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation
of the constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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KUMBHAR DHIRU VARJANG - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR RD DAVE for the Appellant.

MS NANDINI JOSHI, APP for the respondent.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL**Date : 15/06/2006****ORAL JUDGMENT**

This appeal has been preferred against the order
of conviction dated 21st October,1989 passed by the
Learned Additional Sessions Judge, Junagadh in Sessions

Case No.75 of 1987, whereby the present appellant has been convicted and sentenced to undergo rigorous imprisonment of 3 years and pay a fine of Rs.500/-, in default, further rigorous imprisonment of one month for the offences punishable under section 304- Part-II of the Indian Penal Code and no separate sentence under section 323 has been awarded, though convicted for the offence punishable under section 323 of the Indian Penal Code.

2. Learned counsel for the appellant submitted that there are enough omissions and contradictions in the depositions of the prosecution witnesses and, therefore, the order of conviction passed by the Trial Court deserves to be quashed and set aside. Learned advocate for the appellant has taken this Court in detail to the depositions of the prosecution witnesses and pointed out that eye-witnesses have not given clear depositions before the Trial Court. The depositions of prosecution witness Nos.1 & 2 are in contradiction to each other. No independent eye-witnesses have been examined by the Trial Court. There was no intention of causing any injury to deceased and, therefore, the order of conviction deserves to be quashed and set aside.

3. Learned counsel for the appellant submitted that

the injuries caused to the deceased have not been explained by the prosecution. The whole incident had taken place unintentionally. There was a free fight between the complainant side and the accused side. Rest of the co-accused have been acquitted and, there is no cogent and convincing evidence against the present appellant and, therefore, the impugned order passed by Trial Court deserves to be quashed and set aside.

4. Learned Additional Public Prosecutor for the respondent-State submitted that looking to the evidence on record, the order of conviction passed by the Trial Court is absolutely true, correct and in consonance with the evidence on record. Immediate is the FIR from the hour of the incident. The incident had taken place on 17th May, 1987 at 12:30 hours at noon. The FIR was registered on 17th May, 1987 at 17:30 hours. Initially it was recorded by the Una Police Station and thereafter, it was transferred to Girgadhada Police Station as the patient was taken to the Hospital at Girgadhada. PW-1 - Raiyaben, who is the wife of the deceased, has given clear deposition, which is corroborated by deposition of Chhagan Bachu - PW-2 and by Babubhai Mavjibhai PW-4 and also by Bhikhalal Mohanlal - PW-5 and also by scene of offence panchnama at Exh-20. It is also submitted by the

Learned Additional Public Prosecutor that all the four witnesses have given clear depositions before the Trial Court. Though the witnesses are rustic witnesses, they have narrated the whole incident in their natural way, there are no omissions and contradictions in their depositions and, therefore, the conclusion arrived at by the Trial Court is absolutely true, correct and in consonance with the facts of the case. Dr.Jashubhai Gigabhai PW-3 has also narrated the nature of injury, which is on the head of the deceased along with fractures at the skull because of the injuries caused by the appellant. It has also been stated by the Doctor in his deposition that these injuries were sufficient in ordinary course of nature to cause death. It is vehemently submitted by the Learned Additional Public Prosecutor that enough leniency has been shown by the Trial Court in not convicting the appellant under section 302 of the Indian Penal Code and, therefore, further leniency may not be shown by this Court, as the appellant has been convicted under section 304 Part-II of the Indian Penal Code for rigorous imprisonment of 3 years. It is the appellant, who had caused injuries by pelting stone on the head of the deceased - Bachu, who had fallen down immediately and became unconscious. Thereafter, he was taken to the Hospital initially at Girgadhada but

there was no Doctor and, therefore, was further taken to nearby city named Una where, Dr.Jashubhai Gigabhai - PW-3 treated the patient and during the course of treatment, the injured expired on 17th May,1987 at about 22:30 hours. All the prosecution witnesses i.e PW-1, 2, 4 and 5 have narrated the whole incident without contradictions and omissions and they are having enough corroboration from FIR at Exh-10 and from scene of offence panchnama at Exh-20 as also from Post-mortem note at Exh-13 and, therefore, conclusion arrived at by the Trial Court as to the conviction of the present appellant under section 304 part-II of the Indian Penal Code and the quantum of punishment awarded to the appellant is absolutely adequate and justified and in consonance with the facts brought on record by the prosecution.

5. Having heard the learned counsel for both the sides and looking to the evidence on record and the depositions of the prosecution witnesses, in my view, the order of conviction dated 21st October,1989 passed by the Learned Additional Sessions Judge, Junagadh in Sessions Case No.75 of 1987 is true, correct and in consonance with the evidence on record. The appellant-accused has been convicted and sentenced to undergo rigorous imprisonment of 3 years and pay a fine of

Rs.500/-, in default, further rigorous imprisonment of one month for the offence punishable under section 304 Part-II of the Indian Penal Code. The appellant-accused is also convicted for the offence punishable under section 323 of the Indian Penal Code. The impugned order passed by the Trial Court requires no interference by this Court, mainly for the following facts and reasons :-

(i) The incident has taken place on 17th May, 1987. The son of the complainant was beaten by the appellant-accused. Hearing the noise, the father and mother of Chagan Bachu came out of the House and rushed to the place of incident and tried to save their son Chagan Bachu (PW-2). The present appellant-accused was beating Chagan Bachu by a stick. Thereafter, as the father of Chhagan Bachu was intervening, present appellant-accused caused injury on the vital part of the body of Bachu i.e. on the head by pelting stone so sewerly that Bachu had fallen down and became unconscious on the spot. Thereafter, he was taken to the Hospital at Girgadhada Village but the Doctor was not available thereat and, therefore, immediately he was taken to nearby town Una, where he was treated by Dr.Jashubhai (PW-3) and during the course of treatment, injured died on 17th May, 1987 at about 10:30 p.m. Thus, the present appellant had caused

deadly injury intentionally to the deceased Bachu, which, as per deposition of PW-3 Dr. Jashuben was sufficient in ordinary course of nature to cause death. But as there was a sudden scuffling, it appears that benefit of exception to section 300 of Indian Penal Code has been given by the Trial Court to the appellant in not convicting the appellant-accused under section 302 of the Indian Penal Code and instead, the appellant-accused has been convicted and sentenced to undergo rigorous imprisonment of 3 years for the offence punishable under section 304 Part-II of the Indian Penal Code. Looking to the examination-in-chief and cross-examination of PW-1 i.e. Raiyaben - complainant at Exh-9, there is enough evidences against the appellant-accused. Even there is a corroboration by FIR at Exh-10 and the scene of offence panchnama at Exh.20. Looking to the deposition of persecution witnesses and the documents on record, I am of the opinion that she is a trustworthy witness. Though she is a rustic witness, she has given a clear deposition before the Trial Court. There are no omissions and contradictions in her deposition. Every witnesses has to be evaluated on the basis of its trustworthiness. There is no enemocity between the complainant and the appellant-accused. The incident had taken place on a broad day light. The son of the complainant was beaten by

the appellant-accused. The deceased Bachu intervened in the scuffle and so the incident had taken place. So, PW-1- Raiyaben has deposed without any exaggeration. This witness has clearly stated that when accused was beating son Chhagan, the husband of complainant and father of Chhagan intervened. Accused took stone and caused injuries at head of Bachu. Bachu became unconscious. Incident took place on 17th May, 1987 at 12.30 noon. FIR taken at hospital at 17.30 hours. Bachu expired on 17th May, 1987 at 22.30 hours i.e. within 10 hours from incident.

(ii) Looking to the deposition of the prosecution witnesses is. PW-2, PW-4 and PW-5, there are clear accusation against the present appellant. All these witnesses have stated that this appellant, who had caused head injury to the deceased Bachubhai, which was so severe that he fell down immediately and became unconscious and expired on the very day while taking the treatment in the Hospital. The names of PW 3 and 4 are already referred in the complaint. Bhikhalal Mohanlal - PW-5, who is an independent witness has also given enough corroboration to the prosecution case. As a cumulative effect of the depositions of prosecution witnesses, there is enough, cogent and convincing evidence against the

appellant that he has committed the offence punishable under section 304(2) of the Indian Penal Code.

(iii) Looking to the evidence given by Dr.Jashubhai - PW-3, it is stated by him that the husband of the complainant i.e. Bachubhai was brought to the Hospital and during treatment, he expired on the very same day at 10:30 p.m.. There were fractures on the skull. Injuries have been narrated in his deposition. They were on the vital part of the body. It is clearly stated by Dr.Jashubhai-PW-3 that the injuries were sufficient in ordinary course of nature for causing death. The injury was possible by a stone. This fact has also been stated in his deposition. In Post-mortem Note at Exh-13 in column Nos.17, 18 and 19, injuries are reflected and are corroborative to FIR at Exh-10 and it is also corroborative of depositions of prosecution witnesses especially prosecution witnesses No.1, 2, 4 and 5.

(iv) Looking to the evidence on record led by the prosecution along with other documentary evidence like Exh-20 scene of offence panchnama also reflects the fact that what is stated in the FIR at Exh-10 and in the depositions of the PW 1, 2, 4 and 5 is true and correct.

(v) Looking to the evidences on record, it appears that already the benefit has been given by the Trial Court to the present appellant, whereby he has not been held guilty for the offence punishable under section 300 clause third and, therefore, is not punished under section 302 of the Indian Penal Code but he has been rightly held guilty and punished for the offence punishable under section 304 Part-II of the Indian Penal Code. No error has been committed by the Trial Court in appreciating the documents on record. There is no misreading of the prosecution evidence and other evidence on record. Learned advocate for the appellant has also submitted that the injuries caused to the appellant have not been explained by the prosecution. This contention has not been accepted by this Court mainly for reason that looking to the injuries, which are at Exh-21, they are very trifling in nature. There may not be any explanation for such type of trifling injury. Even otherwise also trifling injury on the accused are not required to be explained by the prosecution, especially looking to the facts of the present case. The prosecution witnesses have given clear deposition before the Trial Court, which are fully corroborated by other documents on record. Looking to the nature of injury caused to the appellant-accused, no error has been committed by

prosecution by not explaining the same. Thus, it is rightly concluded by the Trial Court that the prosecution has proved the offence punishable under section 304 Part-II of the Indian Penal Code and the appellant has committed the offence punishable under section 304 Part-II of the Indian Penal Code.

(vi) Learned counsel for the appellant submitted that the benefit of Probation of offenders Act, 1958 may be given to the appellant. Looking to the facts of the present case, it appears that the present appellant had come at the scene of offence, started scuffling with the son of the deceased, started beating the son of the deceased. Thereafter, father of Chhagan intervened. Even the appellant-accused has not spared the intervening deceased and caused injuries on the vital part of his body, resulting into fractures on the skull. The appellant initially had come with a stick and also used stone which clearly reveals the intention on the part of the appellant. Considering all these factual aspects, I see no reason to grant benefit of Probation of Offenders Act, 1958 to the appellant-accused.

6. As a cumulative effect of the aforesaid facts and circumstances of the case and evidence on record, the

order dated 21st October, 1989 passed by the Learned Additional Sessions Judge, Junagadh in Sessions Case No.75 of 1987 is true, correct and in consonance with the evidence on record. Therefore, the order of conviction and sentence passed by the trial court is confirmed by this Court. The quantum of punishment is also in consonance with the guilt of the accused.

7. Learned advocate for the appellant submitted that the present appellant is on bail. The bail granted to the appellant is hereby cancelled and the appellant is directed to surrender to the judicial custody forthwith.

(D.N.PATEL, J)

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